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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ARCH COMMUNICATIONS GROUP, INC.
and PAGING NETWORK, INC.

)
)
) WT Docket No. 99-365
) File No. 0000053846, *et al.*
) DA 99-3028

For Consent to Transfer Control of Paging,
Narrowband PCS, and Other Licenses

To: Chief, Wireless Telecommunications Bureau

MOTION TO DISMISS

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To: Chief, Wireless Telecommunications Bureau

MOTION TO DISMISS

Paging Network, Inc. and its licensee subsidiaries (collectively, "PageNet"), by counsel, hereby respectfully request that the Wireless Telecommunications Bureau ("Bureau") dismiss the so-called "Petition for Reconsideration or Informal Complaint" ("Petition") filed on September 12, 2000 by Metrocall, Inc. ("Metrocall"), an earlier suitor rejected by PageNet in favor of Arch Communications, Inc. ("Arch"). Metrocall's Petition seeks to overturn the merger of Arch and PageNet, which already has received the approval of the Justice Department and the Federal Communications Commission ("Commission"). As shown below, the Petition is grossly untimely, frivolous and has been filed solely to create confusion and delay in PageNet's pending bankruptcy proceeding, which Metrocall believes will work to its advantage.¹ The Commission should summarily dismiss it.

¹ Metrocall is apparently seeking authority to submit a bid to acquire PageNet in the bankruptcy proceeding. Putting Metrocall's conduct in the best possible light, it is attempting to create doubt in the minds of the creditors in the bankruptcy proceeding that the PageNet/Arch transaction can be timely consummated and thus open for itself an opportunity for consideration of its own bid, which has not received the scrutiny of the Justice Department or the approval of the Commission. Additionally, by delaying the Arch/PageNet merger, Metrocall may be trying to leave PageNet in a weakened position for as long as possible so that Metrocall can more advantageously market itself to PageNet's existing and potential customers, while postponing the time when the merged company will be able to compete with it.

PageNet recognizes that the Commission often assigns a low priority to the disposition of defective and frivolous petitions in cases such as this where the Commission action authorizing the parties to merge is fully effective² so that the parties may proceed, despite the pendency of the Petition, to consummate the transaction. Indeed, we note that in 1995 the Bureau's grant of a nationwide narrowband PCS license to one of PageNet's subsidiaries was challenged on frivolous grounds by an unsuccessful applicant who requested the Commission to review the Bureau's action. Five years later, after the facilities had been built and placed in operation, the Commission finally disposed of the opponents application for review. *Paging Network of Virginia, Inc.*, 15 FCC Rcd 6323 (2000).

To the extent Metrocall succeeds in delaying the bankruptcy court's consideration and approval of the merger or creates uncertainty about the effectiveness of Commission approval of the merger, severe harm would be caused to PageNet. PageNet is striving to conserve its resources to maintain its operations and service to its more than eight million customers under most difficult conditions. It is, for example, extremely difficult to hire new employees and retain existing employees in this situation, especially in a very tight labor market. Because PageNet's basic business is providing paging services to customers over extended periods of time, its bankruptcy status substantially undercuts its ability to market its services and to retain existing customers. PageNet's bankruptcy status also makes it very difficult to enter normal commercial and business contracts and agreements because of the uncertainty inherent in

² Under Section 1.102(b)(1) of the Commission's rules, the Bureau's approval of the merger became effective on the date of the public release of the grant, April 25, 2000, and remains effective at this time. Pursuant to Section 405(a) of the Communications Act, 47 U.S.C. § 405 (a), the filing of even a timely petition for reconsideration would not stay the effectiveness of the Bureau's approval of the merger without further order of the Commission. Metrocall has not sought and could not obtain a stay of the consummation of the merger from the Commission.

bankruptcy status. Obviously, the occurrence of the foregoing confers an unfair competitive advantage on Metrocall which should not be tolerated.

1. Metrocall's Petition for Reconsideration Is Untimely.

The merger which Metrocall belatedly is attacking was approved by the Bureau by a Memorandum Opinion and Order released on April 25, 2000, nearly five months ago. Pursuant to Section 405(a) of the Communications Act, a petition for reconsideration of that action "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Section 1.106(f) of the Commission's rules mirrors that requirement and any request for reconsideration should have been filed no later than May 25, 2000. Metrocall admits that it filed nothing within this time limit.³ Thus, the Bureau's approval of the merger has become final and Arch and PageNet are free immediately to consummate their merger upon approval of the bankruptcy court.

In attempting to avoid the strictures of the Communications Act and the Commission's rules, Metrocall relies on inapposite cases, a technique required due to the complete absence of any pertinent authority supporting any of the positions it advances. In *Meredith*,⁴ cited by Metrocall in support of its contention that its Petition may be considered even at this late date, a timely petition for reconsideration had been filed and the dispute there involved the introduction of a constitutional issue for the first time during the reconsideration proceeding. The court found that the Commission had exercised its discretion under its rules to accept a supplement to the timely filed petition for reconsideration, which raised the constitutional argument. 809 F.2d at 869. *Meredith*, therefore, does not support Metrocall's

³ It also is too late for Metrocall to ask the full Commission to review the Bureau's grant of the merger application as applications for review also were due on or before May 25, 2000, pursuant to Section 1.115(d) of the Commission's rules.

⁴ *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

position. Metrocall omits reference to the case upon which the *Meredith* court relied as that case is fatal to its position here. In *Greater Boston Television Corp. v. FCC*,⁵ where the Commission itself sought to reopen its grant of an application to consider new evidence about the qualifications of the applicant after the grant had become final, the court upheld the grant and noted that “so long as the time for appeal to the court has not expired the FCC has jurisdiction to provide reconsideration in its sound discretion,” 463 F.2d at 283, but after that time “[t]he general interest of repose gains dominance....” *Id.* at 282. Here, even though Metrocall claims to have new evidence warranting disapproval of the Arch/PageNet merger, the time for filing for reconsideration, review or judicial appeal of the Bureau’s grant has long expired and its grant of the merger application is indisputably final. Accordingly, to the extent Metrocall seeks reconsideration, its Petition should be summarily dismissed.

Trying to mitigate this procedural infirmity, Metrocall alternatively seeks to characterize its Petition as an “informal complaint”⁶ or an “informal request for Commission action.” (Petition at 4.) Changing the name of the pleading can not affect the finality of the Bureau’s approval of the merger as that would completely undercut the “dominance” of finality or “repose” which has attached to that approval as discussed above.

2. Even Considered As an Informal Complaint, Metrocall Has Not Identified Any Violation of Law or Policy.

Even if allegations of new evidence could not be used to reconsider a decision entitled to finality, the *Greater Boston* court recognized that they might constitute grounds for other types of administrative action such as initiation of revocation proceedings or an

⁵ 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

⁶ Informal complaints under Section 1.716 of the Commission’s rules customarily are used as an informal way to resolve consumers’ problems with carriers, not the type of relief sought by Metrocall here.

investigation. *Id.* at 287. In this connection, PageNet notes that as part of the relief requested Metrocall urges the Commission to “find that the negative covenants granted to Arch’s lenders are unlawful and impermissible.” (Petition at 12.). Even if a term of the credit agreement were improper, which is not the case here, the remedy would be to require amendment of the credit agreement, not disapproval of the merger. *See, AirGate Wireless, L.L.C.*, 14 FCC Rcd 11827, 11849 (1999).

Metrocall claims that it is illegal for Arch to agree with its lenders to pay down its outstanding loans by \$110 million within a year after consummating the merger.⁷ Arch has acknowledged that to do so it may “need to sell assets, which may include excess spectrum.” (Metrocall Exhibit 4.) From this, Metrocall concludes that Arch has or will transfer negative control of the SMR licenses “or unidentified FCC assets” it will acquire as part of the merger to the lenders. (Petition at 7). It has, of course, not a shred of support for this absurd contention that such a covenant effects transfer of control. Metrocall again cites general legal principles about transfers of control but has not identified a single case where the Commission has found an unauthorized transfer of control that involves facts even remotely comparable to this situation. The reason for this glaring omission in the Petition is obvious: such a provision in a loan agreement simply does not constitute a transfer of control.

The law could not be clearer. In *AirGate Wireless, L.L.C.*, *supra*, the Commission reviewed agreements alleged to contain provisions constituting an unauthorized level of control by another company and discussed its long-settled framework for assessing where control lies:

The six factors upon which we have traditionally relied, established in *Intermountain Microwave*, represent the normal incidents of responsibility for the operation and control of a

⁷ Metrocall Exhibit 3. The post-merger credit facility will include a substantial amount of PageNet debt assumed by Arch as part of the merger.

company providing wireless services, such as Leap, and therefore may be used as guidelines. The factors are: (1) who determines and carries out the policy decisions, including preparing and filing applications with the Commission; (2) who is in charge of the payment of financing obligations, including operating expenses; (3) who controls daily operations; (4) who is in charge of employment, supervision, and dismissal of personnel; (5) does the licensee have unfettered use of all facilities and equipment; and (6) who receives monies and profits from the operation of the facilities.⁸

Metrocall does not allege that the lenders will control any of these functions.

Although Arch's only obligation is to pay down the loan by \$110 million within a year,⁹ Metrocall asserts that this provision really requires the sale of SMR licenses to be acquired from PageNet. (Petition at 6-7.) Even if Arch and the lenders had agreed that specific assets, including spectrum, would be sold to pay down the loan, no Commission rule or policy would be contravened by such a provision.¹⁰ Such a provision does not fall within any of the factors discussed above nor do any of the cases relied upon by Metrocall identify it as causing a transfer of control. Here the parties to whom control allegedly has been transferred are not paging, SMR or even telecommunications companies but financial institutions including The Bank of New York, Royal Bank of Canada, Toronto Dominion (Texas), Inc., Barclays Bank PLC, Fleet National Bank and others. They are lenders, not investors,¹¹ and the credit agreement does not

⁸ 14 FCC Rcd at 11840 (footnotes omitted). *See also, Intermountain Microwave*, 24 RR 2d 983 (1963).

⁹ Arch could raise the needed funds in many ways including issuing stock or other securities as well as the sale of assets. It also could seek other financing and pay of these creditors.

¹⁰ Of course, as acknowledged by Metrocall (Petition at n. 5), the subsequent assignment of licenses to a new entity to raise the \$110 million would require Commission approval but Metrocall has not even suggested that Arch plans to assign the licenses without such approval. This also rebuts Metrocall's confusing argument that the covenant complained of violates the Commission's policy against giving security interests in licenses. (Petition at 11.)

give these lenders control over the use or operation of any of Arch's post-merger assets or licenses, its bank accounts, employees, customers, services, rates, practices or policies. Thus, none of the functions the Commission has identified to assess transfers of control will be performed by the lenders; all of them will be performed by Arch.

Even the cases relied upon by Metrocall refute its claims. *News International, PLC*, 97 FCC 2d 349 (1984), involved the exchange of minority stock interests between two media companies and provided for common directors and various restrictive covenants, yet the Commission found that the arrangement did **not** involve a transfer of control. The Commission relied on an earlier case, *Benjamin L. Dubb*, 16 F.C.C. 274 (1951), where it had stated that in assessing a minority investor's control, "we are governed chiefly by the demonstration of his power to dominate the management of corporate affairs." *Id.* at 289. As discussed above, the covenant of which Metrocall complains could not possibly be construed as giving these numerous banks the power to "dominate" Arch's corporate affairs as Arch and only Arch will operate its systems, facilities and business.

Quoting *News International*, Metrocall identifies a variety of negative covenants, which it contends may result in a transfer of control, even specifically emphasizing one restriction relating to the sale or lease of assets. (Petition at 8.) Metrocall fails to note, however, that in the very case listing these covenants and immediately after the passage quoted by Metrocall, the Commission stated that where such provisions had been included to protect **lenders** they "do not necessarily represent a transfer of control requiring Commission

¹¹ The banks will not have equity interests in the merged company or have the right to name any directors. The Commission has indicated that restrictions imposed by lenders will be viewed more favorably than those imposed by investors who are otherwise active in company affairs. *Data Transmission Co.*, 44 FCC 2d 935 (1974).

approval.”¹² Metrocall also failed to mention that in *Data Transmission Co.*, where these types of covenants were listed, the Commission approved an investment containing these covenants, including the sale or lease of assets, by a proposed minority shareholder where he, like the lenders here, was not an officer, director or otherwise active in corporate affairs, expressly holding that “we do not find that these negative covenants [including the sale or lease of assets] by themselves represent the type of transfer of corporate control envisioned by section 310(b) of the Act.” 44 F.C.C. 2d at 936. Metrocall has utterly failed to show that the type of covenant here complained of is in any way unusual or inappropriate or has ever been found by the Commission to constitute a transfer or abdication of control.¹³

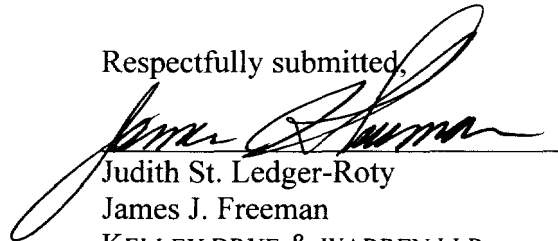
¹² 97 FCC 2d at 356, citing *Flathead Valley Broadcasters*, 5RR 2d 74 (Rev. Bd. 1965). The passage quoted by Metrocall and attributed to *News International* actually was originally from another case, *Data Transmission Co.*, 44 F.C.C. 2d at 936, and involved a proposed minority investment in a carrier by an alien.

¹³ To some extent of control, this covenant resembles an option granted to a person to acquire licensed facilities. Under Metrocall’s theory, because the holder of an option to buy a broadcast station at a specific price can compel the licensee to sell the station to him at that price, there already has been an unauthorized transfer of control. Yet, the Commission does not consider the mere holder of an option to have even an attributable interest in the station subject to the option. *See*, 47 CFR §73.3555, Note 2(f) (1999); *BBC License Subsidiary L.P.*, 10 FCC Rcd 7926, 7933 (1995).

3. Conclusion.

Given the foregoing it is apparent that this Petition is both procedurally defective and substantively frivolous and therefore should be summarily dismissed as “sham and false.”¹⁴ As noted above, PageNet realizes that such pleadings do not command a high priority for disposition given the size of the Commission’s workload and recognizing that action on the Petition is not required for the Arch/PageNet merger to be consummated. PageNet therefore expects to complete the merger as previously approved by the Commission upon receipt of the approval of the bankruptcy court.

Respectfully submitted,



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September 22, 2000

¹⁴ 47 CFR §1.52 (1999).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was hand delivered this 22nd day of September, 2000, to the following:

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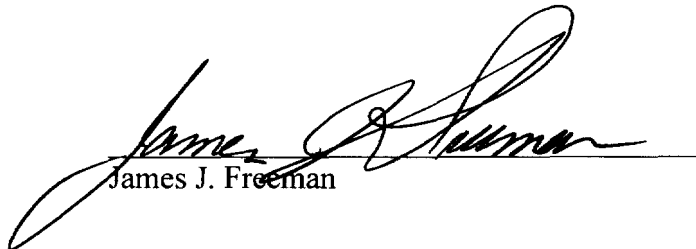
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